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RIEF

FILED
MAR 3 - 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-605

IN THE

Supreme Court of the United States

TOWN OF CHESTER,

Petitioner,

v.

LAROE ESTATES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR AARON-ANDREW P. BRUHL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus is a law professor at William & Mary Law School. His teaching and research interests include federal courts and federal jurisdiction, and he has recently written an article that addresses some of the issues raised in this case. *See* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901122. *Amicus* has an interest in the clarification and sound development of the law of federal jurisdiction, and he submits this brief to assist the Court in understanding how the Court's ruling on the particular question at issue in this case relates to broader principles of the law of standing.[1]

SUMMARY OF ARGUMENT

The question presented in this case—whether an intervenor-plaintiff requires Article III standing to sue—represents one aspect of the broader question whether all plaintiffs in a multiple-plaintiff case require standing to sue. Respondent Laroe Estates, Inc., which seeks to intervene as a plaintiff, relies heavily on a string of cases in which this Court has stated that it need not inquire into the standing of every plaintiff in a case after it has found one plaintiff with standing. *See* Br. in Opp. to Pet. for Writ of Cert. at 17.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or his counsel made a monetary contribution to the brief's preparation or submission. *Amicus* files this brief in his personal capacity and does not speak for his employer. The parties have consented to the filing of this brief.

This brief addresses the question whether all participating plaintiffs in a case, including intervenor-plaintiffs like Laroe, must demonstrate Article III standing. The answer is *yes*. The relevant case law, a proper understanding of Article III, and practical considerations all support reversal of the Second Circuit's ruling that Laroe could intervene without demonstrating standing. Reversal is appropriate on either of two grounds.

The cleanest and clearest way to resolve this case is to hold that all participating plaintiffs in a case should be required to have standing, regardless of what issues they present or what relief they seek.[2] In a case with multiple plaintiffs, one good plaintiff is not good enough for an Article III court. Instead, all plaintiffs need standing. The idea that "one good plaintiff is enough" is untenable in light of cases like *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006), and *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998). These cases establish that Article III requires a granular approach to standing that prohibits one finding of standing from being shared

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[2] *Amicus* uses the term "*participating* plaintiffs" to distinguish unnamed plaintiffs in class actions. Class actions present different issues in light of their representative nature. Moreover, class actions present complications because heterogeneity of injury within a plaintiff class has implications for class certification as well as for standing. The Court need not address standing requirements for unnamed class members in class actions to resolve the question of participating-plaintiff standing in this case. *Cf. Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016) (noting that the Court granted certiorari to consider issues involving the standing of class members but did not reach those issues because the petitioner changed its argument in its merits briefing).

across separate claims, remedies, or, as relevant here, plaintiffs. Furthermore, requiring all plaintiffs to have standing would not compromise pragmatic values that might be thought to justify a truncated standing analysis. To the contrary, it is allowing standingless plaintiffs into a case that leads to impracticality and licenses absurd results.

In any event, even if the presence of one plaintiff with standing is *sometimes* sufficient to permit other plaintiffs to participate in a federal case, that rule does not apply in a case like this one. This Court requires individualized standing inquiries when plaintiffs may raise distinct issues or seek monetary relief. A party without Article III standing, if tolerated at all, certainly is not permitted to expand the controversy or obtain a monetary judgment, so the decision of the Second Circuit can also be reversed on that narrower ground.

ARGUMENT

The question presented in this case—whether an intervenor-plaintiff requires Article III standing to sue—is one version of a broader question, namely whether all participating plaintiffs in a multiple-plaintiff case must demonstrate Article III standing. Respondent has expressly drawn the connection between the particular matter of intervenor standing at issue here and the broader question. Br. in Opp. to Pet. for Writ of Cert. at 17-19. This Court too has linked the two questions, such as by citing cases from one of the contexts as authorities in the other context. *See McConnell* v. *FEC*, 540 U.S. 93, 233 (2003) (citing *Clinton* v. *City of New York*, 524 U.S. 417, 431 n.19 (1998), and *Bowsher* v. *Synar*, 478 U.S. 714, 721

(1986), which involved multiple plaintiffs but not intervention).

The correct answer to the question of intervenor-plaintiff standing before the Court flows from the correct answer to the general question of plaintiff standing: intervenor-plaintiffs require standing because all participating plaintiffs require standing. That would be a simple, bright-line rule, the kind of rule that courts find especially valuable in matters of jurisdiction. *See, e.g.*, *Hertz Corp.* v. *Friend*, 559 U.S. 77, 92, 94 (2010). There is, in addition, a narrower rule that the Court could adopt to dispose of this case: Additional plaintiffs require Article III standing when their inclusion in the case introduces new issues or requires plaintiff-specific remedies.

I. AT A MINIMUM, PLAINTIFFS WHO PRESENT DISTINCT ISSUES OR DEMAND DAMAGES REQUIRE ARTICLE III STANDING.

This Court has stated in a number of cases that it need not consider the standing of all plaintiffs as long as one plaintiff has standing. *E.g.*, *Massachusetts* v. *EPA*, 549 U.S. 497, 518 (2007); *Clinton*, 524 U.S. at 431 n.19; *Bowsher*, 478 U.S. at 721. But it has not treated that concept as a mandatory rule, nor has it applied it in all cases. *See Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2343-47 (2014) (analyzing standing of both plaintiffs and finding that both had standing); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (analyzing standing of each plaintiff organization and finding that all three had standing). Indeed, there are two thresholds over which the cases that dispensed with examining the standing of each plaintiff have not

crossed: allowing plaintiffs who have not demonstrated standing to seek separate relief or alter the issues presented. The Court should, at the very least, hold that line and reverse the decision below, which ventures into new territory by allowing intervention when the court has not resolved whether the intervenor will assert new remedies or issues.

First, the cases in which the presence of one Article III plaintiff has been deemed sufficient to license the participation of other plaintiffs who may lack standing have been cases involving generalized declaratory and injunctive relief, typically cases in which the plaintiffs challenged statutes, regulations, or other governmental policies as unlawful. *E.g.*, *Clinton*, 524 U.S. at 425 n.9, 431 n.19 (declaratory relief concerning constitutionality of Line Item Veto Act); *see also Nat'l Ass'n of Optometrists & Opticians* v. *Brown*, 567 F.3d 521, 523 (9th Cir. 2009) ("As a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing."). When this Court declares a statute or regulation void, that ruling has precedential force throughout the country. Such a ruling therefore has the practical effect of settling the matter for all persons, whether they were parties to this Court's decision or not. In light of that practical effect, it is understandable, even if not necessarily consistent with standing doctrine, *see infra* Part II, for the Court not to expend the effort to determine the standing of all participants when it does not appear to affect the outcome of the litigation.

When damages are sought, by contrast, the impropriety of awarding money to a plaintiff without standing is hard to miss. And so, unsurprisingly,

plaintiff-by-plaintiff standing inquiries are necessary in damages cases. *See* MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE – CIVIL § 101.23 (3d ed. 2016) ("[O]nce a court determines the existence of one plaintiff with standing, at least when generalized equitable relief is sought, it need not consider whether other plaintiffs also have standing to assert that claim. Of course, in order to qualify for the award of damages each plaintiff must establish injury.")

Although not every intervenor seeks an award of damages, or even intervenes as a plaintiff, Laroe appears to be an example of an intervenor who does. In its proposed complaint in intervention, Laroe would join the case as a plaintiff and demand compensatory damages for a regulatory taking of its asserted interest in the property. J.A. 148 (referring to itself as "Plaintiff"); *id.* at 162 ("WHEREFORE, Laroe prays that this Court grant judgment against the Defendants awarding *it* damages and other appropriate relief as follows . . . An award of compensation for the *taking of Laroe's interest in the subject real property* . . . ." (emphasis added)). Even if Sherman and Laroe both want "the same relief" in the sense that both plaintiffs want money judgments as compensation, judgments benefit and burden *specific people*. That is no trifling matter. *See, e.g.*, *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 463-68 (2000) (holding that due process prohibited the amendment of the judgment and the pleadings to add a corporate party's sole shareholder as an additional party to the judgment). Given the person-specific nature of judgments, it is hard to see how *Sherman's* Article III injury could authorize a judgment—backed by the power of the United States—in *Laroe's* name (either singly or jointly), when the court has not satisfied

itself that Laroe is a proper Article III plaintiff. If an entity wants an Article III judgment in its favor, it needs an Article III injury.

Second, the Court has been comfortable truncating its standing inquiry in cases in which all plaintiffs present the same issues for decision.[3] But when different plaintiffs present different issues, the Court has been more exacting, so as to ensure that it does not decide issues that are presented only by plaintiffs who may lack standing. For instance, in *Lewis v. Casey*, the Court considered the propriety of an injunction ordering Arizona to improve the law libraries throughout its prison system and to take

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[3] *E.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 233 (2003) ("It is clear, however, that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's); *Sec'y of Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State's"); *Gen. Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 402 (1982) ("Petitioners have not challenged the standing of the other plaintiffs and, therefore, even if Pennsylvania lacks standing, the District Court possessed Art. III jurisdiction to entertain those common issues presented by all plaintiffs."); *Buckley* v. *Valeo*, 424 U.S. 1, 12 (1976) (stating that "[i]n our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient personal stake in a determination of the constitutional validity of each of the challenged provisions" (footnote and internal quotation marks omitted)); *see also Cal. Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 44-45, 67-70 (1974) (bypassing a plaintiff-by-plaintiff standing analysis in a section of the opinion in which the same issues were presented by each plaintiff but conducting separate standing inquires in a later section of the opinion where the plaintiffs presented different issues).

other steps to protect inmates' access to the courts. 518 U.S. 343, 346-47 (1996). The 22 plaintiffs were prisoners who had sued as representatives of a class composed of all Arizona prisoners. But only two prisoners, both of them illiterate or nearly so, had been found by the district court to have suffered adverse consequences (such as dismissal of a case) due to inadequate access to legal resources. *Id.* at 357-59. As the Court explained, the fact that illiterate prisoners had suffered injury did not allow such persons to obtain relief for prisoners whose circumstances differed, such as prisoners who did not speak English, those held in lockdown, or those in the general prison population. *Id.*[4]

Again, this case illustrates the distinction. Even assuming that exactly the same acres of dirt are at issue in both plaintiffs' takings claims, the two plaintiffs' allegedly compensable *interests* in the dirt necessarily present different questions. That is especially true in light of the nature of a regulatory-takings analysis. The determination whether Laroe is entitled to recover for a regulatory taking of its alleged interest involves consideration of (among other things) the nature of Laroe's interest (if any), when the purported interest vested, whether the Town's actions sufficiently thwarted Laroe's purported reasonable investment-backed expectations, and whether Laroe obtains any offsetting benefits to other holdings. *See Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332

[4] The Court further held that the district court's order of system-wide relief in favor of illiterate prisoners was excessive given the limited evidence of system-wide violations, though this last ruling was not based on Article III standing. *Id.* at 359-60 & n.7.

(2002) (observing that a regulatory-takings claim usually requires an ad hoc "fact specific inquiry"). Laroe therefore does not appear to claim to occupy a position that is "identical" to its co-plaintiff's. *See Sec'y of Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984) (dispensing with plaintiff-by-plaintiff standing inquiry where plaintiffs had "identical" positions).

In short, one might summarize the Court's cases this way: when it appears to matter that a case contains multiple plaintiffs, the Court ensures that all of the plaintiffs have standing. Here it matters, and this case presents an opportunity for the Court to emphasize that an intervenor-plaintiff must have standing at least when it arguably seeks separate relief and raises different issues from the plaintiff who demonstrated standing.[5]

II. ALL PARTICIPATING PLAINTIFFS NEED ARTICLE III STANDING.

A. Allowing One Plaintiff to Rely on Another Plaintiff's Standing Is Inconsistent with Basic Requirements of Standing Doctrine.

The Court should go one step further and clarify that *all* participating plaintiffs must in all cases demonstrate standing. Allowing courts to stop their standing inquiry after finding one proper plaintiff is inconsistent with standing doctrine, even in cases in which all plaintiffs present the same issues and remedies. Such a practice is inconsistent with the rest of standing law and inconsistent with the appropriate scope of federal judicial power. Disapproving the

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[5] *Amicus* takes no position on whether Laroe in fact has standing.

concept of "one good plaintiff" would enhance the coherence of standing law. Furthermore, requiring that all participating plaintiffs have standing does not compromise the aims of judicial economy that are said to justify pretermitting standing for supernumerary plaintiffs.[6]

1. It is fundamental to the properly limited nature of the federal judicial power that the federal courts do not grant relief to plaintiffs who do not present a "case or controversy." The precedential effect of an opinion applies to everyone within the reasoning's scope and the court's jurisdiction, but judgments bind only particular people. *See Taylor* v. *Sturgell*, 553 U.S. 880, 903-04 (2008); *Stryker* v. *Crane*, 123 U.S. 527, 539-40 (1887). Because judgments are person-specific exercises of judicial power, an additional plaintiff requires standing even when that person seeks the same relief and presents the same issues for decision as a proper plaintiff. *See Vt. Agency of Nat. Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 779 (2000) (pretermitting a jurisdictional question of Eleventh Amendment immunity by explaining that doing so would not "permit the court to pronounce upon any issue, *or upon the rights of any person*, beyond the issues *and persons* that would be reached" otherwise (emphasis added)); *see also Tyson Foods, Inc.* v.

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[6] The same rule should apply to other kinds of parties who invoke federal judicial power, such as appellants and petitioners. All of them need standing, just as all plaintiffs do. *Cf. Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2661 (2013) (explaining that invoking federal appellate review requires standing to do so); *Diamond* v. *Charles*, 476 U.S. 54, 64-71 (1986) (dismissing appeal where appellant lacked standing and party who had standing did not appeal).

Bouaphakeo, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.").

Allowing joinder of standingless plaintiffs leads to absurdities. A person who is attentive, sensitive, and litigious enough could then be an intervenor-plaintiff in hundreds of cases every year. Provided just one plaintiff in each of the cases has standing, this putative plaintiff's own standing need never be shown—and he or she could participate in discovery and other activities and even win favorable judgments. That could not be right. As one court of appeals observed in ruling that intervenors require standing, "a federal case is a limited affair, and not everyone with an opinion is invited to attend." *Mausolf* v. *Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996). "The more the merrier" may be a good principle for party hosts, but not for federal courts.

2. To the extent one could try to square the notion of standingless participating plaintiffs with the demands of Article III, the most logical argument would be that the initial plaintiff and defendant establish the requisite "case or controversy" and that additional plaintiffs, so long as their claims are transactionally related to the existing dispute, can attach their claims to that constitutionally sufficient case. That is, the argument analogizes to the concept of supplemental jurisdiction now codified at 28 U.S.C. § 1367. But this attempt to defend the rule of "one good plaintiff" cannot survive contact with basic principles of standing doctrine.

The Court rejected the notion of "ancillary standing" in *DaimlerChrysler Corp. v. Cuno*, 547 U.S.

332 (2006). The plaintiffs in that case challenged the legality of both a state tax credit and a municipal tax exemption. The Court held that the plaintiffs lacked standing to challenge the state tax credit. *Id.* at 346. The plaintiffs' then claimed that their (assumed) standing to challenge the municipal tax exemption gave them a form of "ancillary standing" that would nonetheless allow them to bring their challenge to the state tax credit, which arose from the same set of operative facts. *Id.* at 351-53. The Court rejected the plaintiffs' argument, ruling instead that every claim must have its own basis for standing. *Id.* at 352. "[S]tanding," the Court emphasized, "is not dispensed in gross." *Id.* at 353 (quoting *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996)). The Court's ruling in *DaimlerChrysler* coheres with other decisions that take a granular approach to standing, such as cases holding that plaintiffs must demonstrate standing separately for each form of relief they seek. *See Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). The reasoning underlying *DaimlerChrysler* applies to parties just as much as it applies to claims. It is antithetical to well-ordered Article III jurisdiction to allow courts to hear and decide claims from parties that do not present their own case or controversy. Courts already have a vehicle through which interested parties who lack standing may participate—*amicus* briefing.

Allowing joinder of standingless plaintiffs is also incompatible with this Court's rejection of "hypothetical jurisdiction" in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998). According to the erstwhile doctrine of hypothetical jurisdiction, a federal court could "proceed immediately to the merits [of the case], despite jurisdictional objections,

at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.* at 93. In other words, the doctrine licensed a court to skip over a complicated jurisdictional question in order to rule against the plaintiff(s) on the merits. The particular jurisdictional question in *Steel Co.* was one of Article III standing. *Id.* at 102. The Court rejected hypothetical Article III standing, and hypothetical jurisdiction more generally, because a court without authority cannot lawfully decide the merits at all, even if only to decide the merits against a plaintiff who, upon careful inquiry, may have also lost on jurisdictional grounds. *Id.* at 94-95. To resolve the merits in the absence of jurisdiction is, "by very definition . . . to act *ultra vires*." *Id.* at 102.

The rule of "one good plaintiff" operates similarly to the rejected doctrine of hypothetical jurisdiction: if a court is going to decide the merits anyway due to the presence of one plaintiff with standing, the thinking goes, then resolving complicated standing issues for co-plaintiffs is a waste of effort. But even if the "one good plaintiff" rule serves judicial economy, that benefit cannot justify skipping over standing, for to do so is, as *Steel Co.* teaches, to act without authority.

Indeed, the doctrine urged by Laroe would do something that the doctrine of hypothetical jurisdiction would never had contemplated in its wildest dreams. In cases like *Steel Co.*, the plaintiff was going to lose one way or the other, and the only question was whether the loss would be based on jurisdiction or merits. Laroe hopes to *win* on the

merits without demonstrating it has Article III standing. This is hypothetical jurisdiction on stilts.

3. The Court does not appear to have attempted to explain how Article III could ever allow a court to rest content with finding one good plaintiff in a multiple-plaintiff case. The more recent cases pretermitting the standing of some parties tersely refer to previous cases, frequently in one sentence, often in a footnote. But even when one traces back through the chain of citations, one does not find an attempt to explain the constitutional basis for allowing a plaintiff who may lack standing to participate in a federal case.

The closest thing to a justification that *amicus* could identify in this Court's cases is this passage in *Doe v. Bolton*, one of the early cases to bypass a plaintiff-by-plaintiff standing inquiry:

> We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations.

410 U.S. 179, 189 (1973). The implicit theory here appears to be that a finding of standing makes no practical difference, and so the analysis can be skipped, presumably as a matter of judicial convenience. *Doe*, like the other cases in which the Court has employed the one-plaintiff approach, was not a case in which the Court granted review in order to clarify or modify the law of standing; rather, standing was addressed on the way to addressing the

merits question that was the Court's focus. *See generally* Bruhl, *supra*, at 18-22 (tracing the relevant history).

B. Skipping Over the Standing of Additional Plaintiffs Creates Practical Problems.

An interest in judicial economy cannot overcome the requirements of Article III, as *Steel Co.* and many other cases show. But even setting that crucial point aside, the supposedly pragmatic argument for truncating the standing inquiry fails on its own terms. Its fatal defect is the premise that the standing of other plaintiffs has no practical significance when one proper plaintiff has been found, at least in cases seeking injunctive or declaratory relief. That premise is incorrect, as exemplified in cases where plaintiffs win and the question of entitlement to attorneys' fees and costs then arises. Even courts otherwise willing to bypass plaintiff-by-plaintiff standing inquiries usually recognize the need to verify every plaintiff's standing when such awards are at issue. *E.g.*, *Bethune Plaza, Inc.* v. *Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988); *Women's Med. Ctr. of Providence, Inc.* v. *Roberts*, 512 F. Supp. 316, 319-20 (D.R.I. 1981). *But see* Bruhl, *supra* at 24-25 (citing cases in which courts awarded fees or costs to parties who never showed standing). Questions about who can enforce injunctions may raise similar concerns about whether all plaintiffs really have standing. *E.g.*, *Planned Parenthood of Idaho, Inc.* v. *Wasden*, 376 F.3d 908, 918 n.6 (9th Cir. 2004). If a court merely postpones a ruling on standing until a point when party-specific details come to the fore, the work has not been eliminated but just pushed off until later, all the while

keeping an improper party as a participant in the case.

When additional plaintiffs will eventually *lose* on the merits (which, of course, often cannot be known ahead of determining their standing), the pragmatic argument for pretermitting standing has more practical appeal, but here too the gains can prove illusory. Different consequences attach to jurisdictional losses versus merits losses, such as different preclusive effects in later litigation. 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4436 (2d ed. 2002) (explaining that a dismissal for lack of standing does not preclude later litigation of the same claim, provided the lack of standing can be overcome in the second suit). For that reason, it may be unclear what preclusive effect to give a purportedly merits-based ruling regarding a plaintiff whose standing was bypassed. *See* Bruhl, *supra*, at 40-41 (describing uncertainty over preclusive effects when courts bypass standing). On the one hand, if the first judgment is open to reexamination in a later suit, or if uncertainty over the judgment's preclusive effects merely breeds later litigation, then the court has undermined the efficiency rationale for pretermitting standing. On the other hand, to treat the first court's determination of the merits as fully binding would be jarring given the real doubt about the plaintiff's standing to invoke federal jurisdiction. These are two bad options. Choosing the path of immediate expediency often sows the seeds of future confusion.

C. Requiring All Plaintiffs to Have Standing Is Not Impractical and Does Not Unduly Burden Courts.

Inconvenience is sometimes the necessary cost of complying with Article III, but requiring that all participating plaintiffs have standing does not impose significant burdens on the courts. There are even some practical benefits.

First, when the plaintiffs in a case are similarly situated (e.g., voters in an unlawfully drawn district, businesses subject to an industry-wide regulation), the parties' standing inquiries will all be parallel, and so a court can easily handle them *en bloc*. *E.g.*, *Sprint Commc'ns Co., L.P.* v. *APCC Servs., Inc.*, 554 U.S. 269 (2008); *FEC* v. *Akins*, 524 U.S. 11 (1998); *Bennett* v. *Spear*, 520 U.S. 154 (1997). In each of the cases just cited, and many others, there were multiple plaintiffs but only one standing analysis.

Second, once it is clear that all participating plaintiffs need standing, parties with questionable standing will have less incentive to try to ride along as additional plaintiffs in a suit that has a clearly injured plaintiff. The burden of establishing standing is on the plaintiffs at every stage, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *McNutt* v. *Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188–89 (1936), and so supernumerary plaintiffs will face the costs of collecting affidavits, spending pages of briefing on the question, and the like. Riding along would no longer be free.

Third, even when some plaintiffs in a case do present distinctive and difficult standing issues, the court will not always have to rule on them. Although

courts must not ignore standing, courts do possess some flexibility in managing a case's progression. A court of appeals may remand for further proceedings on the standing of one plaintiff while addressing the merits as to others. In that scenario, the contemplated proceedings on remand will often prove unnecessary, as the case will settle in light of the merits ruling as to the proper plaintiff. Similarly, if a district court rules that one plaintiff has standing but requests additional briefing regarding another plaintiff, or notes during a preliminary conference that such a course is possible, the defendant might agree to settle the case or the other plaintiffs might voluntarily dismiss themselves rather than attempt to prove their own standing to seek the generalized relief that is usually at issue in these cases. *See* Bruhl, *supra*, at 49-51 (describing how courts should handle cases with multiple plaintiffs).

Fourth, requiring that all plaintiffs have standing would not deprive the public of judicial decisions on important matters. In the multiple-plaintiff cases at issue, there already is another litigant who has standing. So the same merits issues can be resolved regardless.

Fifth, although pretermitting a difficult standing decision yields a short-run benefit in the case at hand, it does so at the cost of depriving the legal system of precedent. Precedent on close questions of standing has value for the public and other courts.

Sixth, the quality of the litigation process would not suffer if plaintiffs lacking standing were excluded. One might worry about the situation in which the would-be plaintiff without standing is a well-equipped interest group while the co-plaintiff with standing is

an unsophisticated (but concretely and particularly injured) individual. But as in other cases, there are ways to compensate for weak plaintiffs. For instance, the sophisticated party can file briefs as *amicus curiae* or provide *pro bono* representation to the injured-but-under-resourced party.

D. Requiring That All Plaintiffs Have Standing Would Not Cause Unfairness.

Disapproving the mistaken notion that some federal plaintiffs can "borrow" a co-plaintiff's standing would not visit any unfairness on putative plaintiffs. The generic group composed of "persons who lack a constitutionally cognizable harm" could hardly have ordered their affairs around the prospect of becoming a plaintiff when, and only when, they encounter a pending federal suit that already has one good plaintiff. *Cf. Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) (rejecting a judge-made procedure governing the sequencing of issues for decision, which "[did] not affect the way in which parties order their affairs"). The supernumerary plaintiffs who would be barred are *by definition* persons who could not invoke Article III jurisdiction on their own. They are, so far as Article III is concerned, mere bystanders, bystanders who nonetheless seek a federal-court judgment by virtue of the pendency of a case between proper parties. The Court need not protect a bystander's opportunity to interject itself into someone else's dispute.

Further, and finally, any possibility of unfairness shrinks to nil given that pretermitting standing after finding one good plaintiff has been treated as a discretionary *option* for the courts. That is, courts say that they "*need not* consider" whether all plaintiffs in a case have standing to sue when all present the same

issue, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 431 n.19 (1998) (emphasis added), but there is no *prohibition* on undertaking a plaintiff-by-plaintiff inquiry.[7] This Court has not always stopped with one plaintiff, even when it probably could have done so according to the "one good plaintiff" approach used in other cases. *E.g.*, *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2343-47 (2014); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000). Some possibly standingless plaintiffs, though not all, have gotten lucky in the past, but there is no entitlement to good fortune.

* * *

In short, it is widely understood that a plaintiff must have standing for each of its claims and for each form of relief it seeks; so too, a plaintiff needs standing even to lose on the merits. *DaimlerChrysler*, 547 U.S. at 351-53; *Friends of the Earth*, 528 U.S. at 185; *Steel Co.*, 523 U.S. at 101-02. In light of all that, it cannot be that a federal plaintiff may pursue a judgment without having Article III standing, merely because a co-plaintiff has standing. Neglecting to require all

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[7] *E.g.*, *Thiebaut* v. *Colo. Springs Utils.*, 455 F. App'x 795, 802 (10th Cir. 2011) ("[C]ourts retain discretion to analyze the standing of all plaintiffs in a case and to dismiss those plaintiffs that lack standing."); *We Are Am./Somos Am. Coalition of Ariz.* v. *Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1091 (D. Ariz. 2011) (court was "[not prohibited] from considering the standing of the other plaintiffs even if it finds that one plaintiff has standing."); *see also Florida ex rel. McCollum* v. *Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1148 (N.D. Fla. 2010) (addressing standing of all plaintiffs "for the sake of completeness"), *aff'd in part and rev'd in part*, 648 F.3d 1235, 1243 (11th Cir. 2011), *aff'd in part and rev'd in part sub nom. Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566 (2012).

participating plaintiffs to demonstrate standing may falsely appear to serve judicial economy, but in fact it both offends Article III and ignores the inefficiencies that anomalous practice creates.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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